

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

ALAN H. SMITH,

Plaintiff,

v.

CIV No. 13-435 MCA/GBW

ALLEN BATTS, *et al.*,

Defendants.

**ORDER**

THIS MATTER comes before the Court on Plaintiff's Opposed Motion to Amend Second Amended Complaint.<sup>1</sup> *Doc. 96*. At the Rule 16 Scheduling Conference held on May 21, 2014, the Court advised Plaintiff that *pro se* Defendants Plasters, Treadwell, and Rainbow Ranch, Inc., appeared to be private parties unaffiliated with Luna County. Their actions, as set forth in the complaint, were therefore likely not "under color of law" as required to state a claim under 42 U.S.C. § 1983. *Doc. 89* at 2. The Court gave Plaintiff until June 13, 2014 to voluntarily dismiss these Defendants or to move to amend his complaint. *Doc. 90*. The Court stated that, should Plaintiff elect to amend his complaint rather than dismiss these defendants, "the [remaining] *pro se* Defendants will then be given a deadline within which to file motions to dismiss." *Doc. 89* at 2.

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<sup>1</sup> Plaintiff captions his motion as "opposed." This nomenclature is correct because not all defendants responded with their position. However, the Court notes that Defendant Donna Plasters and Defendant Rainbow Ranch Inc. are unopposed. *See doc. 96* at 3. As to the remaining Defendants, Plaintiff was unable to obtain their concurrence prior to filing his motion. Having failed to file a response, they also consent to the motion. *See D.N.M.LR-Civ. 7.1(b)*.

Plaintiff filed his Motion to Amend on June 12, 2014, in which he seeks to voluntarily dismiss Claim 1 of his Second Amended Complaint (*doc. 85*), as well as Defendants Plasters, Rainbow Ranch, Inc., Diaz, Spivey, and Milo. *See generally doc. 96*. Plaintiff's proposed Third Amended Complaint does not dismiss *pro se* Defendant Treadwell.

Under Rule 15, "a party may amend its pleading *once* as a matter of course" under two specified circumstances. Fed. R. Civ. P. 15(a)(1) (emphasis added). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave where justice so requires." *Id.* 15(a)(2). Here, Plaintiff's request is governed by Rule 15(a)(2).

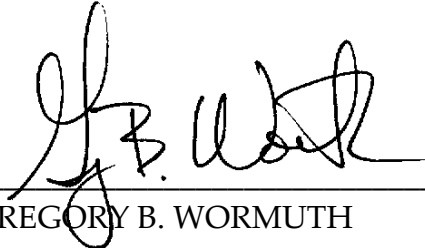
As noted above, either through explicit concurrence or failure to file a response, all Defendants consent to granting Plaintiff's request. *See supra* p.1 n.1. Moreover, having reviewed the proposed amended complaint provided by Plaintiff, the Court finds no basis on which to deny leave to amend.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Amend (*doc. 96*) is GRANTED. Plaintiff shall file the amended pleading attached as Exhibit 1 to his motion as Third Amended Complaint.

IT IS FURTHER ORDERED that, pursuant to their omission from the Third Amended Complaint, Defendants Plasters, Rainbow Ranch, Inc., Diaz, Spivey, and Milo, are hereby DISMISSED from this action.

IT IS FURTHER ORDERED that, because Plaintiff did not elect to voluntarily dismiss his claims against Defendant Treadwell, the Court will give Defendant Treadwell until **August 6, 2014** to file a Motion to Dismiss based on the argument that his actions were not “under color of law.”

Finally, IT IS HEREBY ORDERED that the City Defendants’ Partial Motion to Dismiss (*doc. 86*) is DENIED AS MOOT. Should Defendants wish to press the arguments contained therein against Plaintiff’s Third Amended Complaint, they should file the renewed motion no later than **August 6, 2014**.



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GREGORY B. WORMUTH  
UNITED STATES MAGISTRATE JUDGE